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REMARKS ON THE ATTACHMENT LAW OF OHIO.

[By Charles D. Drake.]

[We publish this article with great satisfaction, and would express our hearty concurrence with the learned author in nearly all his conclusions. We have never been in favor of process against the *person* of a debtor, except in the case of *fraud*, and *non-residence* is not fraud. But we are in favor of a greatly enlarged process against the *property* of a debtor in the first instance; and to all Mr. Drake says upon this point we give our full assent. We earnestly hope the next Legislature will take up the present Attachment Law, and give it a thorough revision; and, in commending to their favorable consideration the views of Mr. Drake, we take occasion to say, as within our knowledge, that this gentleman has been for some time engaged in preparing a treatise upon attachments, in the course of which he has examined the Attachment Laws of nearly all the States, and is therefore better qualified to offer wise suggestions upon the subject than most members of the profession. Eds.]

In all the States and Territories of the United States, legislation has been, and continues to be, directed to the protection of creditors from the dishonest and fraudulent practices of debtors. To thwart such practices, two remedies, *capias*, and attachment against property, have been resorted to. For various reasons, but especially because the spirit of the times and popular feeling are adverse to imprisonment for debt, process against the body of the debtor has in many of the States been abolished, while in others its power is so feeble and inefficacious as greatly to limit its use. The latter is the case in Ohio; and it may be considered as settled, that the creditor who has no remedy here against his debtor but a *capias*, might as well abandon the hope of collecting his debt. Under such circumstances, it is reasonable and just that efficient and com-

prehensive laws should be made for subjecting the property of debtors to the payment of their debts. Such laws exist in favor of execution creditors; but cases every day arise which call for a remedy antecedent to the execution, and no such remedy, of any appreciable value, is provided in the voluminous code of this State. As might be expected, it is well known, not only to the profession, but to men in other business, that cases are frequent in which the creditor is wholly at the mercy of his dishonest debtor, and is obliged to accept terms—if, indeed, any be offered—far less advantageous than the debtor is believed to be able to make, and than the creditor would think of submitting to, were not each party fully advised of the indirect but actual *protection*, which our laws afford to those who *scheme cunningly* to evade the payment of their just debts.

With reference to all such cases, the inquiry naturally arises, what remedy do the laws of the great and enlightened State of Ohio afford? We turn to the statute book, and find "*An Act allowing and regulating Writs of Attachment.*" From the title, it might be inferred that the wisdom of the Legislature of a State, which had always fulfilled its own engagements promptly and honorably, had devised a plan for compelling its citizens, and all others having property within its jurisdiction, to meet their engagements in like manner. It is needless to say to the profession, that such an inference is not sustained by a perusal of the act; and it is to be wondered at, that, from June 1st, 1824, when this act took effect, now more than twenty-three years, not a single effort seems to have been made by the Legislature, to enlarge the operation or increase the power of this lame and circumscribed statute; though every lawyer of much practice must often have experienced its inefficiency.

The scope of the act is found in the first section, which provides that an attachment may issue, upon affidavit being made, "that the debtor hath absconded, to the injury of his creditors, or is not a resident of the State." It would not be easy to frame an attachment law of more limited utility than this. Its operation against non-resident debtors is proper, for it is the duty of every government, as far as possible, to secure to its citizens the collection of debts from debtors residing beyond its jurisdiction. But why the remedy should, as to resident debtors, be confined to the single case of absconding, and that *after* the party *has* absconded, it would probably be difficult for any one satisfactorily to explain. Are there no

other circumstances in which a debtor's property should be seized, and held to abide the judgment of the Court? Let us see.

1. A creditor ascertains that his debtor is *about* to abscond with his effects from the State. He can prove the fact, and knows his debtor to possess sufficient property to satisfy his debt; and yet he must wait until the debtor has actually absconded, taking with him his property, before a writ can be had to seize the property. Of course, when the writ is issued, there may be, and usually will be, nothing to levy on.

2. A debtor, without intent to *abscond*, is about to remove with his property out of the State, thereby subjecting his creditors to the necessity of following him into another jurisdiction, in order to reach his property. The creditors must needs wait, until, by his removal, he has become a non-resident, and then an attachmen be of no avail.

3. A debtor, in order to avoid service of the ordinary proce law, may conceal himself, or so absent himself from his usual place of abode, that he cannot be reached by that process. His property is visible and tangible, but he is *non est.* In such case the law makes no provision for proceeding *in rem.*

4. A dishonest debtor may be in the act of fraudulently disposing of his effects. His creditors know it, and also know that long before a judgment in the usual course can be had, he will not have a dollar's value of visible property; and yet they cannot arrest his proceedings by seizing his effects.

5. Such a debtor, by a colorable transfer, may have put his effects into the hands of another, and he and his confederate in the fraud may defy his creditors to reach the transaction by a levy, before judgment and execution obtained.

6. Such a debtor may sell all his effects, and have no visible property, and yet his creditors may learn that he has, in the hands of another, money sufficient to pay off his debts. As long as he is a resident of the State, and has not absconded, that money cannot be reached, except by tedious and expensive proceedings in Chancery.

7. One may contract a debt with the pre-determination not to pay it. But, though the proof be as clear as demonstration, and the debtor may be daily disposing of that for which the debt was contracted, and speedily will have made way with the whole of it, yet there is no immediate remedy against his property.

These are some of the modes in which the rogue may, and often does, defraud his honest creditors, under the *quasi* protection of the

law. The propriety and justice, in each designated case, of immediately subjecting the rogue's property to the payment of his debts, will hardly be questioned. It may be said that such exigencies are met by the allowance of a *capias.* It is admitted that, in rare instances, that writ may be of some avail; but all who are acquainted with its practical operation in this State, know that in the large majority of cases it is utterly inefficient The antagonist writ of *habeas corpus* will not fail, in perhaps nine cases out of ten, to set the rogue at liberty. Hence the necessity for a process which shall, if possible, without fail, seize and hold *property;* which, once in the custody of the law, can neither be released by *habeas corpus*, nor fraudulently concealed or made way with.

But, limited as are the scope and vigor of the Attachment Act of Ohio, the Legislature seem to have skilfully devised and embodied in it a provision, which almost paralyzes its energy, and restricts its use to a very small number of cases. The eleventh section of the act, providing for the distribution of the money arising from the sale of attached property, among all creditors of the defendant who may file their claims against him, gives, indirectly, to the debtors, an unjust advantage over their creditors, besides doing an unconscionable wrong to that creditor, who, by his superior vigilance and activity, acquires information which enables him to fix the first lien on the debtor's property. Instances are doubtless of frequent occurrence, in which the property of debtors is not attached, when the the law would allow it, because the creditor who knows of its existence, and of the facts which would justify an attachment, knows also, that if he attach, others will reap the benefit of his process, perhaps to the almost entire exclusion of himself. He will not subject himself to the trouble and expense of an attachment suit, when he knows that after other creditors, who, it may be, held back from attaching, shall have reaped the benefit of his proceedings, he will probably have little more than enough to pay his attorney's fee—in some cases, perhaps, not enough. And, as he can derive little or no advantage from the information he has obtained, he will not be desirous that others should, and will, therefore, withhold it; or, if it be communicated to another creditor, he will be equally disinclined to incur expenditure of time and money, merely for the doubtful satisfaction of seeing others share with him the reward. Thus does the law, by planting obstacles in the creditor's way, indirectly afford immunity to the debtor, and encourage fraudulent practices, even while it assumes to hate all fraud with a perfect hatred, and to be keen-scented and eagle-eyed in its detection.

The only reason known to the writer, as urged in favor of this anomalous and inequitable provision, is, that a debtor's property ought not to be seized and appropriated by the most grasping of his creditors, but should be equally apportioned among all. The *prima facie* glittering plausibility of this position is its only recommendation: it has no soundness. Were this equal distribution of the property of debtors the uniform policy of the law, then the case in hand should not form an exception; but all laws regulating the remedies of creditors against debtors, proceed upon another and opposite principle. "*Vigilantibus non dormientibus, Lex subvenit,*" is a maxim as old as the common law, and recognized and enforced in every common law Court in the world. It has, every where and at all times, been found a wise and safe rule; and every departure from it leads to mischievous results. Whenever, under a mistaken notion of general equity, law-makers essay to establish an equality of rights and benefits between the sluggish and the vigilant, the indolent and the active, the principles of equal and exact justice are overturned. In this, the day of the common law's maturity, we cannot, without violating sound reason, establish in beaten tracks any new axiom; *a fortiori*, is it unsafe to unsettle one, whose wisdom and justice have been acknowledged in every Anglo-Saxon Court for nearly a thousand years.

But, if the principle embodied in this section be sustainable, why is it not carried out in all cases? If it is right to compel an attaching creditor to share the avails of his attachment with others, why not extend the rule to *execution creditors?* Why suffer one, in advance of all others, to sweep with his execution his debtor's whole property, to the exclusion of the rest? Why divide out the benefit of a creditor's lien in one instance, and not in all? If in one case, why not in all, deprive a man of the avails of his energy, vigilance, expense, and labor? And then, going a step farther, if creditors must all share alike, why permit a failing debtor to pay one in full, and leave the rest with a moiety, or less, of their just claims? Why allow property to be pledged or mortgaged for the benefit of one of many creditors—negotiable securities to be paid out on one debt, and not on others—judgments to be confessed in favor of selected creditors—or any of the various resorts of debtors to prefer favored individuals? Why not prohibit all these things? The reason offered to sustain the rule in the attachment case, will equally uphold it in any other: then why not establish it as the universal policy of the law? Simply because it is glaringly and mischievously absurd—too absurd to admit of the slightest defence.

Let us, then, hope that the Legislature will remove from the act a section, which, at the same time, violates one of the oldest and wisest maxims of the law, and all well established ethics.

Other defects in this law appear to even the casual reader. Why, as in the seventh section provided, should a party claiming attached property, be sent out of the Court issuing the attachment, and whose judgment upon his claim he invokes, to have his rights tried before a Justice of the Peace, and decided by a jury of five men? The property attached may be of the value of thousands of dollars, and difficult and abstruse questions of law may be involved: why should the controversy be remitted to a tribunal whose ordinary jurisdiction does not exceed a hundred dollars, and to a jury, which, under no circumstances, can be supposed competent to decide wisely matters of law, which might require all the wisdom of our highest judiciary to resolve aright?

Again—there is no provision for *alias* attachments, to reach property discovered after the return of the first; for attachments in aid of a summons previously issued; for attachments on debts not due, in cases of fraud; for attachment of property of deceased non-residents; for attachments against non-resident firms, by the name of the firm, where the individual names are unknown; for an attaching creditor contesting the right of a previous attacher, who, in collusion with the debtor, seeks, upon a simulated or fraudulent claim, to forestall honest creditors: all of which cases are contemplated and provided for in other States, and might judiciously be the subject of legislation here.

These views have been thrown together, because the writer has of late had occasion to examine the Attachment Acts of many of the States of the Union, and was struck with the inferiority of that of Ohio to most of the others; and in the hope that attention, in the proper quarter, may be directed to the framing of a liberal law, in favor of the just creditor against his fraudulent debtor.

REPORT OF THE NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS.

In pursuance of the provisions of the new Constitution of New York, three Commissioners were appointed to revise the system of Practice and Pleadings in that State—Messrs. Graham, Loomis, and Hill. Of these, Mr. Hill recently resigned his office, because he considered that his colleagues were going too far in their views of reform. The other two have since made a report of progress to the Legislature, in which they recommend an entire abolition of the present system of practice and pleadings, and the construction of a new one, the characteristics of which we shall now point out. The subjects of their consideration are thus classified:

1. A revision and condensation of the laws regulating the organization of the Courts;
2. Civil actions and their incidents;
3. Proceedings and pleadings in civil actions;
4. Costs;
5. Appeals;
6. Summary and special proceedings created and regulated by statute;
7. Proceedings in Surrogate Courts;
8. Practice and pleadings in criminal cases.

The results they aim at are thus stated:

1. The establishment of a new system of practice and pleading, instead of a plan of amendment merely.
2. The abandonment of the distinction between the modes of proceeding and pleading, in cases of legal and equitable cognizance, and the adoption of an uniform system as applicable to all cases.
3. That the distinctions of forms of actions at law be no longer retained, and that every action rest upon its own facts and the law of the case as applicable to the rights which it involves; and
4. The establishment of a new system of pleading, based upon the principles which have just been stated.

Their general views may be gathered from the following extracts:

"The dangers which are apprehended, from the attempt to embody the rules of practice and pleading in the form of a complete system, we cannot permit ourselves to believe are, to any great extent, well founded. On the contrary, it is our firm belief, that even

if the principles of the old system were to be retained without alteration, it would not only be desirable but necessary that they should be collated and condensed in a form calculated to render them intelligible and simple. As it now stands, it is composed of disjointed parts, so widely scattered through statutory enactments, rules of Courts, and a long course of judicial decisions, both in England and in this State, that an investigation of any branch of it is a work of the utmost difficulty and embarrassment. Indeed, we do not hesitate to express our confidence that there are very few in the legal profession, however prepossessed they may be in favor of a continuance of the present system, who will not agree with us at least in this, that these difficulties and embarrassments are often productive of the most glaring injustice in the determination of legal controversies. The learning with which our books are filled, is in a great measure made up of discussions of questions very remotely, if they can be at all considered as bearing upon the real matter in dispute; and thousands of reported cases are now presented to the lawyer and the student, as the sources to which, with the aid of elementary works and digests, he must resort, if he would acquire any understanding at all, to say nothing of a thorough one, of the rule by which he must govern himself in the mere formal business of a suit. Of the vast number of contradictions in judicial determination upon these subjects, which continuously present themselves, both the bar and bench, wherever the system prevails, have united in loud and bitter complaint. The Legislative power has been, over and again, exerted to remove the evil, and hundreds of statutes have been passed, modifying, amending, or abrogating portions of the system. These, in turn, have led to renewed discussions and to new constructions, not always in harmony with the spirit of the Legislative will, and what is more, not always consistent with themselves.

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"In these observations, we disclaim any intention to reflect either upon those who have occupied, or who now occupy high judicial positions; but at the same time we feel bound to say, that there have been Judges who have affected to regard any Legislative interference with established forms as neither wise nor expedient, and who have felt themselves justified in giving the narrowest construction and the slightest possible effect to statutes, amendatory, or, as they have been sometimes called, *derogatory* of the common law. Such a course of action is the result of long association with institutions which have derived their chief attractiveness from their antiquity, and of a veneration for forms with which they have been made familiar by a long course of legal training and experience. It is a tendency inseparable from the character of the human mind, and of which we cannot be charged with disrepect in speaking as we have, when we have the high authority of Sir Matthew Hale for its existence and its pernicious operation. 'By long use and custom,' says that distinguished Judge, 'men, especially that are aged, and have

been long educated to the profession and practice of the law, contract a kind of superstitious veneration of it beyond what is just and reasonable. They tenaciously and vigorously maintain these very forms and proceedings and practices, which, though possibly at first they were reasonable and useful, yet, by the very change of matters, they become not only useless and imperfect, but burdensome and inconvenient, and prejudicial to the common justice and common good of mankind—not considering that the forms and prescripts of law were introduced, not for their own sakes, but for the use of public justice; and therefore, when they become insipid, useless, impertinent, and possibly derogatory to the end, they may and must be removed.'

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"As the jurisdictions of law and equity existed in this State, up to the period of the adoption of the new Constitution, vested in separate and distinct Courts, it seemed to follow, as a necessary consequence, that distinct modes of procedure should exist applicable to the peculiar functions of each of those Courts; though, in our opinion, many differences in matters of practice were recognized, which, even under the former distinctions of jurisdiction, were unnecessary. But as these jurisdictions are now established, there is, in our judgment, no longer a necessity for a difference in mere modes of procedure, in cases of the character to which we refer. Keeping in view the distinctions to which we have before adverted, between the rights of parties, and the mere means by which those rights are to be ascertained and enforced, the simple inquiry which here presents itself, is, whether a mode of proceeding, common to all civil controversies, and adequate to the end in view, can be safely and conveniently prescribed. We do not intend in any manner to interfere with the question of right between litigant parties; nor do we intend to discuss the effect of the Constitutional provision vesting law and equity jurisdiction in the Supreme Court, so far as that provision may be supposed to affect substantial rights. All that we mean to say is, that we are satisfied, upon the fullest consideration, that there need be no difference in the form of proceedings leading to and consequent upon their determination. The object of every suit, so far as modes of proceeding are concerned, is to place the parties whose rights are involved in it, in a proper and convenient form before the tribunal by which they are to be adjudicated, to present their conflicting allegations plainly and intelligibly to each other and to the Court; to secure by adequate means a trial or hearing of the contested points; to obtain a judgment or determination adapted to the justice of the case, and to effect the enforcement of that judgment by vigorous and efficient means.

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"We propose to reduce the system of pleading to one of *allegation* merely, without reference to discovery, in the mode which will

presently be suggested; so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable. And, in order to prevent any prejudice which might otherwise result from the necessity now existing in equity for the kind of pleading to which we have referred, we shall present a series of enactments, providing that in all cases, either party may obtain from the other a discovery under oath of all facts necessary to the prosecution or defence of the action.

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"The third consideration connected with this subject is, the existing differences in the form of judgment and the means of enforcing it peculiar to the Courts of law and equity. Judgments in the former are, with very few exceptions, compensatory, while in the latter, in a majority of cases, they embrace specific relief peculiar to each case. It is a leading feature of our proposed plan to require in all cases a judgment adapted to the established rights of the parties; and we can see no difficulty in incorporating into it, as a portion of a uniform system of practice, a form of execution which shall adapt itself to the judgment

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"We shall accordingly propose that no action hereafter to be commenced, need be designated in any process, pleading or proceeding therein, by any name, form or distinction of action heretofore known or now existing; but that the only test of the right of the party complaining to a remedy such as his case shall entitle him to, shall be whether, in his complaint, he sets forth a sufficient legal right, and a violation or withholding of such right by the party complained against.

"The only remaining subject to which we propose to allude, and one which we deem susceptible of most thorough reform, is that of *pleading.* The pleadings in an action, as they are termed, are, in theory, and formerly were in practice, the mutual allegations of the parties. They are designed to set forth the grounds of action or defence upon which the parties respectively rely, and to present them intelligibly to the parties and to the Court by which the controversy is to be determined; so that, if it appear that the parties differ in their conclusions of law upon a state of facts alleged by one and admitted by the other, the matter may be referred to the decision of the Court; and that if a statement of matters of fact be alleged by the one which is denied by the other, the truth thereof may be ascertained by a jury or other proper forum, to the end that the appropriate judgment may be given thereon. These pleadings, as now used both at law and in equity, have become by the subtilties of pleaders and the refinements of construction, so technical and intricate as to have rendered it apparent that the ends of substantial justice require the entire abrogation of the present system, and the adoption of a new one based upon the principle on which pleading was originally founded, and designed to apply to pleading as the only standard of their formal sufficiency, the test

whether they plainly and intelligibly present the matters in issue between the parties, whether those matters involve conclusions of law or of fact. For the accomplishment of this object, we are well convinced, after the most thorough consideration of the subject, no other adequate means are open to us than to provide for the entire abolition of the system, and the substitution in its place of one which shall rest upon, and at the same time fully carry out, the object for which pleading is designed.

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"The system of pleading which we design to propose, will be substantially this: That the pleadings shall consist of a declaration and an answer, which shall set forth the facts constituting the cause of action or defence, truly, in plain and concise language, and in such a manner as to enable a person of common understanding to know what is intended. The ingredient of truth in pleading, to be attained by providing, in proper cases, for an affidavit at least of the belief that the facts alleged are true. All matters alleged on either side, and not denied on the other, to be taken as true. No other pleading than the declaration and answer to be permitted, excepting where new matter is set up in the answer, in which case it may be denied by replication."

Thus far the Report. In much of what is said and proposed, the writer of this article entirely concurs. He has long believed that a very thorough reform in the *law of procedure* is demanded by the best interests of society. But his views never went quite to the length of those presented by the New York Commissioners. The best plan of reform which has occurred to him, is, to abolish the common law actions and pleadings, and bring all remedies within the *forms* of Chancery; because these forms are well known and established, and are probably as simple and certain, as we can ever hope to frame; or, if not, they may be amended as occasion may require. On this very important subject, the views of the writer were publicly expressed as far back as 1837; and as a lapse of ten years has not weakened his opinion of their correctness, he hopes it will not be deemed indelicate or improper to subjoin some extracts. These extracts are from Walker's Introduction to American Law, first edition, published in 1837.

"In some few instances, the redress sought by a civil action, consists in the recovery of *some specific article of property*, wrongfully withheld from the plaintiff by the defendant; but most frequently the object of an action is to obtain *compensation in money* for an injury complained of, which compensation is technically called *damages*. It is obvious that for *injuries to property*, this is generally the most easy and natural kind of redress, since money is the universal

measure of value; and besides it is often impracticable to obtain *satisfaction in kind.* But it may at first view appear strange, that pecuniary damages should be the redress sought for *personal injuries*, since we are accustomed to hold personal immunities to be beyond all price. If my property has been injured, or my dues withheld, I can readily tell the exact sum which will make me whole; but if my body has been bruised, my health impaired, or my reputation slandered, how can I tell what amount of money will compensate me for the injury? It is evident that strictly speaking, there can be no *equivalent* in such cases; but it is also evident, that unless we resort to the principle of *retaliation*, which vindictively doubles the amount of injury, pecuniary damages, though often inadequate, constitute the only satisfaction which the law can furnish. Were we now at liberty to classify actions, upon any principle of analysis, it would follow from what has been said above, that only two classes would be necessary; and these might be, *first*, for injuries to the person and for injuries to property; or, *secondly*, for injuries of commission and for injuries of omission; or, *thirdly*, for the recovery of the specific thing and for the recovery of pecuniary damages. But, instead of a simple and natural division of actions, such as either of these would be, we are compelled, by peculiar circumstances in the history of the common law, to recognize a perplexing variety of actions, abounding with arbitrary and technical distinctions. *Page* 503.

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"Perhaps you will now be tempted to inquire what necessity there is for such a variety? Why one action of contract would not answer all the purposes of three? Why the five actions of *tort* might not be reduced to two—namely, one for the recovery of the specific thing, and the other for the recovery of damages for injury or detention? And why the action of ejectment would not be equally efficient and still more conclusive, when divested of its circuitous and fictitious character? It might be difficult to satisfy a philosophic mind that all these changes would not be improvements. If the forms of civil redress were now for the first time to be prescribed, and the task were committed to capable men, it is not probable they would much resemble those in present use; because no analysis, either of contracts or torts, would produce such a result. If each minute difference were to require a peculiar form, the number would be infinitely greater. If not, there would be no reason for making it so great. But these forms have come down to us through the lapse of centuries; and by various contrivances before alluded to, they have been gradually moulded and extended so as to meet the increasing wants of civilization; and the true question now is, whether a reform be on the whole expedient. No doubt this part of the law is susceptible of great simplification; and it is equally clear that a consolidation of the forms of action would render litigation much less expensive. It would likewise go far to exculpate the remedial part of the law from the charge of unnecessary intricacy

and technicality. The number of cases decided upon mere questions of form, would be vastly diminished. Fictions would no longer occupy the place they now so unworthily hold in the administration of justice; and common law would approximate more nearly to the common sense of mankind. *Page* 513.

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"The professed object of these rules of pleading is to bring the parties to what is called an *issue*; that is, to extract from their allegations the exact matter in controversy, divested of every thing extraneous, and resting upon direct affirmation and negation. At first view, this would seem to be an easy thing. If the plaintiff only state with clearness and precision the nature of his complaint, and the defendant do the same with regard to his defence, one would suppose that an issue might be made without any artificial rules; but instead of this, *special pleading* has been wrought up, by a series of refinements, into an art so difficult, that it requires years of study and practice to master it. Anciently the pleadings were conducted orally, and taken down by the clerk. Up to 1353, the record was in Norman French, from which time to 1730, it was in Latin; and since the latter epoch it has been in English. When the pleadings ceased to be oral, a distinct class of lawyers grew up, called *special pleaders*, who were compensated for their labor in proportion to the number of words employed. From these facts four important consequences have resulted; namely, *first*, the pleadings are still expressed, as if made orally, and taken down by the clerk. *Secondly*, the style of pleading is exceedingly clumsy and awkward, being for the most part a very literal translation of the old French or Latin. *Thirdly*, pleadings are redundant beyond all example, being stretched out and amplified, by means of pleonasms, synonymes, and tautologies, to the utmost possible length, in order to increase the fees. This abuse, however, has been partially reformed in this country, by abolishing the English rule of compensation, and having no distinct class of special pleaders. *Fourthly*, the system of pleading abounds with exceeding subtilty and technicality. The common observer would be apt to regard it as a wonderfully elaborate monument of the misdirected ingenuity of man. *Page* 523.

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"It would indeed be difficult to devise a system of practice better calculated to answer all the ends of judicial controversy, than the system of Chancery practice now in use. It has pre-eminently the merit of reasonableness and simplicity. Though the cases to which its remedies extend, are nearly, if not quite as numerous and diverse, as those of law; yet, instead of nine or ten distinct forms of proceeding, it has but one for all cases; and that is founded, and throughout constructed, upon the principles of nature and reason. Fictions are entirely dispensed with, and truth substituted in their place. The parties tell their stories, as men of common sense would tell them; and the Court pronounce their decrees in a corres-

ponding style. There is no occasion for the Procrustean system of torturing forms to meet circumstances. Were this system of procedure extended, as it might easily be, to all the matters of civil controversy, whether in law or equity, even leaving the principles as they now are, the benefits of such a reform could hardly be overrated. And I hope the time is not far distant, when the reign of technicality will end, and that of simplicity begin. Such a change would be similar to that which was effected in philosophy by the overthrow of syllogistic reasoning, and the substitution of the inductive method. *Page* 567.

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"I have before suggested that the forms of Chancery procedure might be readily adapted to all cases in law as well as in equity; and does not this expedient of making up an issue for a jury, whenever such recourse is necessary, and so shaping such issue as exactly to meet the exigency, take away the only plausible objection that could be raised, against so immense an improvement, namely, the want of trial by jury? *Page* 587.

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"We have three distinct *actions of contract;* while in reason there can be no imaginable necessity for more than one. Indeed, by abolishing seals, as before suggested, the action of covenant would at once be dispensed with; and then debt and assumpsit could be readily consolidated. Again, there are five distinct *actions of tort*, while there can be no occasion for more than two; one to recover the specific thing, as in replevin, and the other to recover damages for injury or detention. Again, though we have gained much by extending the scope of *ejectment*, so as to supply the place of real actions, yet that action would itself be greatly improved by striking out all the fictions, and adapting the language of the proceedings to the object they are now intended to effect. By these three measures, the law of remedies would be immensely simplified; but this is not the limit of improvement. The grandest step of all would be, to adopt the forms of *Chancery proceedings* in all civil cases, leaving the principles of law as they now are. These forms are as simple and rational as we can ever hope to devise; and they are abundantly adequate to all civil remedies." *Page* 655.

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ENGLISH COURT OF COMMON PLEAS: JANUARY, 1847.

LANE *v.* DIXON.

TRESPASS—LODGINGS—BREAKING AND ENTERING BY LANDLORD, WHAT IS EVIDENCE OF, &C.

THIS was an action of trespass for breaking and entering the plaintiff's apartment in the defendant's house. The plaintiff, who was a physician, had taken furnished apartments from the defendant for a remaining portion of a quarter. The defendant lived in the house in which the apartments were, and the only way to the apartments was through the lobby of the house. The parties having had some disagreement, the defendant, before the expiration of the term, stood in the lobby of the house, and prevented the plaintiff from passing from the street through the lobby into the apartments, at the same time telling him he should no longer have them. The defendant objected, at the trial, that there was no evidence of any breaking and entering into the apartments. ERLE, J., overruled the objection, reserving leave to the defendant to move to enter a nonsuit; and the jury assessed damages for the breaking and entering.

BYLES, having obtained a rule *nisi* to enter a nonsuit, WILKINS and WHITE showed cause.

WILDE, C. J. In respect of so much of this rule as relates to the alleged trespass in breaking into the apartment, the objection is, that no evidence was given in support of the plaintiff's case. It appears that the plaintiff having taken lodgings for a certain term, which was unexpired, was told that he should no longer be allowed the possession of them, and was refused admittance to them; and it is said that upon these facts it was not competent for the jury to infer a breaking and entering into the apartments by the defendant. It seems to me, however, that there was reasonable evidence to support the verdict of the jury. The period during which the defendant expelled the plaintiff, the nature of the property, and other circumstances, must all be taken into account. These were apartments which were not locked up; the defendant excludes the plaintiff from them, and when he returns, says, "you shall no longer have them." Considering that this was a house let for lodgings, what use can it be supposed that the defendant would make of

them after expelling the plaintiff? Out of Court no reasonable man would doubt that the defendant would make use of the apartments, and that that was the object of the expulsion. It was admitted, on argument, by the defendant's counsel, that it might make a difference in the inference to be drawn, according as the plaintiff had been kept out a longer or a shorter time. I agree that it would; but if so, it is a question for the jury; and I agree with the conclusion they have come to. *Rule discharged.*

THE NEW CONSTITUTION OF ILLINOIS.

The Illinois Constitutional Convention closed its labors on the last day of August, after a session of upwards of eighty days. The result of those labors has been submitted to the sovereigns for their deliberation until the first Monday of March, when, "it is confidently expected," they will give it the impress of their approval or disapproval. Whether there was any necessity for the call of a Convention, it is not now our purpose to discuss. It will not be denied that there were evils in the old Constitution; but we think we do not err, in saying that the imaginary exceeded the real. Experience, however, will show whether it would not have been the wiser part to have borne "those ills," "than fly to others that we know not of."

We do not propose, in the present article, to examine the various provisions of the new Constitution *in extenso*, but will confine ourselves to the judiciary department, giving the principal sections as adopted by the Convention, and noting the changes in connection. It may not be amiss to observe here, that the supposed necessity for amending the Constitution was based, principally, upon what were alleged to be important defects in the judiciary system. Some, indeed, have been so far wanting in charity as to intimate that the real objection was not so much to the system as to some of the incumbents of the bench. Be that as it may, the Convention was called, has deliberated, and here is its result, so far as relates to that branch of the government:

§ 1. The judicial power of this State shall be, and is hereby vested in one Supreme Court, in Circuit Courts, in County Courts, and in Justices of the Peace: provided, thatinferior local Courts, of civil and criminal jurisdiction, may be established by the General Assembly in the cities of this State; but such Courts shall have a uniform organization and jurisdiction in such cities.

This section is more specific than the corresponding one of the old Constitution, which briefly declared that the judicial power should be vested in one Supreme Court, and such inferior Courts as the General Assembly should, from time to time, ordain and establish.

§ 2. The Supreme Court shall consist of three Judges, two of whom shall form a quorum; and the concurrence of two of said Judges shall in all cases be necessary to a decision.

The Court originally consisted of four Judges; but the number was increased by the Legislature of 1840–41 to nine, under the authority given in the third section of the fourth article of the Constitution, which provided for an increase after the year 1824. That Legislature dispensed with the then existing Circuit Court, aud required the Circuit duties to be performed by the Judges of the Supreme Court, to each of whom a Circuit was specially assigned. We were opposed to this change; but as it did not, in its practical operation, prove as exceptionable as was anticipated, we were not disposed to risk an entire remodelling of the organic law in order to remedy what, we sincerely believed could, in a comparatively short time, have been cured by legislative action.

§ 3. The State shall be divided into three grand divisions, as nearly equal as may be; and the qualified electors of each division shall elect one of the said Judges for the term of nine years: provided, that after the first election of such Judges, the General Assembly may have the power to provide by law for their election by the whole State, or by divisions, as they may deem most expedient.

§ 4. The office of one of said Judges shall be vacated, after the first election held under this article, in three years; of one, in six years; and of one in nine years, to be decided by lot, so that one of said Judges shall be elected once in every three years. The Judge having the longest term to serve, shall be the first Chief Justice.

At present, the Judges are elected by joint ballot of both branches of the General Assembly, and hold their offices "during good behavior." Vacancies, in the interim, are filled by Executive appointment until the last day of the ensuing session of the General Assembly.

We are by no means partial to the innovation made by the third section, though it may be far preferable to the miserable log-rolling and sacrifice of self-respect, which have too often attended the operation of the present mode of filling judicial offices. We are no advocates of the elective principle, as applied to the judiciary, and having no political ends to accomplish, we could not, had we been honored with a seat in the Convention, have given it our support against our better convictions. We hold, with a late writer, that

"the Judge is not a representative officer;" that "he is not a delegate in any sense of the word." We heartily assent to the views expressed on the subject by the Hon. Onslow Peters, of Peoria, whose able speech we propose to notice in a future number.

§ 5. The Supreme Court may have original jurisdiction in cases relative to the revenue, in cases of mandamus, habeas corpus, and in such cases of impeachment as may be by law directed to be tried before it, and shall have appellate jurisdiction in all other cases.

The jurisdiction conferred by this section is substantially the same as that now exercised by the Supreme Court, though more specifically stated.

§ 6. The Supreme Court shall hold one term annually in each of the aforesaid grand divisions, at such time and place, in each of said divisions, as may be provided for by law.

There is now but one term, annually, of the Court, which is held at the seat of government. It is questionable whether the provision of this section is an improvement. The present place of holding the Court is central; a term of the United States District Court is holden at the same time and place, and every alternate year, if not oftener, a session of the General Assemby, many of whose members are lawyers, having business in one or both of those Courts. Under the new arrangement, there will probably be an increase of business in the Court, and a greater division of it among the members of the bar, who reside elsewhere than at the seat of government—"a consummation devoutly to be wished" by the less favored of the profession.

§ 7. The State shall be divided into nine judicial districts, in each of which one Circuit Judge shall be elected by the qualified electors thereof, who shall hold his office for the term of six years, and until his successor shall be commissioned and qualified: provided, that the General Assembly may increase the number of Circuits to meet the future exigencies of the State.

§ 8. There shall be two or more terms of the Circuit Court held annually in each County of this State, at such times as shall be provided by law; and said Courts shall have jurisdiction in all cases at law and equity, and in all cases of appeals from all inferior Courts.

§ 9. All vacancies in the Supreme and Circuit Courts shall be filled by election as aforesaid: provided, however, that if the unexpired term does not exceed one year, such vacancy may be filled by Executive appointment.

The seventh section brings us back to the old Circuit Court system. The elective principle and a limited official tenure are the only new features. The tenure of office, it will be seen, is shorter than that of the Supreme Judges. The jurisdiction will probably remain unchanged.

§ 10. The Judges of the Supreme Court shall receive a salary of twelve hundred dollars per annum, payable quarterly, and no more. The Judges of the Circuit Courts shall receive a salary of one thousand dollars per annum, payable quarterly, and no more. The Judges of the Supreme and Circuit Courts shall not be eligible to any other office or public trust, of profit, in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them, for any elective office, (except that of Judge of the Supreme or Circuit Court,) given by the General Assembly, or the people, shall be void.

§ 11. No person shall be eligible to the office of Judge of any Court of this State, who is not a citizen of the United States, and who shall not have resided in this State five years next preceding his election, and who shall not for two years next preceding his election, have resided in the division, Circuit, or County in which he shall be elected: nor shall any person be elected Judge of the Supreme Court who shall be, at the time of his election, under the age of thirty-five years; and no person shall be eligible to the office of Judge of the Circuit Court until he shall have attained the age of thirty years.

§ 12. For any reasonable cause, to be entered on the journals of each House, which shall not be sufficient ground for impeachment, both Justices of the Supreme Court, and Judges of the Circuit Court, shall be removed from office, on the vote of two thirds of the members elected to each branch of the General Assembly: provided, always, that no member of either House of the General Assembly shall be eligible to fill the vacancy occasioned by such removal: provided, also, that no removal shall be made unless the Justice or Judge complained of shall have been served with a copy of the complaint against him, and shall have an opportunity of being heard in his defence.

Under the old Constitution, the salaries of judicial officers were not limited, though there was originally a temporary limitation to those of the Judges first elected. Their salaries could be raised, but not diminished during their continuance in office. The tenth section fixes permanently the salary of the Supreme Judge at twelve hundred dollars, that of the Circuit Judge at one thousand dollars. We regard this as one of the worst features of the new Constitution. It is a penny-wise and pound-foolish policy—a policy which modern legislators and constitution-makers are too prone to adopt. It may "take" with the mass, but its operation is bad. The services of gentlemen of the bar are often estimated—and it is not a bad criterion—by the amount of the compensation required; and we can see no good reason why it is not equally applicable to the bench. These salaries cannot be expected to command the first legal talent of the State, and hardly even a tolerable amount of it. Besides, they are not properly apportioned. While the Supreme Judge is only required to hold three terms of his Court annually, extending through a period of something less than one fourth of a year, the Circuit Judge is required to hold two annual terms in each County of his Circuit, which comprises from ten to fifteen Counties. It may be said that the former has Chamber duties to perform out of term time. So has the latter. At a fair calculation, he has at least twice the duty to perform, is absent from his home full three fourths of the year, and consequently subjected to a larger

amount of traveling expense than the incumbent of the other bench. If political preferment could, as heretofore, be accelerated by making the bench of either Court an auxiliary, there might be more inducement to the politically ambitious of the profession. But all hope from this source is cut off by the non-eligible feature of this section, and this is no slight cause of gratulation. It is a great advance toward preserving the purity of the judicial ermine.

The eleventh section is not particularly objectionable in the main, though its occasional operation might be attended with feelings of regret, so far as two years' residence qualification is concerned. We will be pardoned when we say, that at the first election of Judges of the Supreme Court, that result will be produced in the second grand division, where public opinion seemed to have settled upon two gentlemen, now on the bench, but one of whom can be elected, as each resides within the same division.

The twelfth section is similar to the provisions of the old Constitution, with the additional requirement of notice to the Judge complained of, before he can be removed from office.

The thirteenth, fourteenth, and fifteenth sections relate to the time of electing the Judges.

§ 16. There shall be in each County a Court, to be called a County Court.

§ 17. One County Judge shall be elected by the qualified voters of each County, who shall hold his office for four years, and until his successor is elected and qualified.

§ 18. The jurisdiction of said Court shall extend to all Probate and such other jurisdiction as the General Assembly may confer in civil cases, and such criminal cases as may be prescribed by law, where the punishment is by fine only, not exceeding one hundred dollars.

§ 19. The County Judge, with such Justices of the Peace in each County as may be designated by law, shall hold terms for the transaction of County business, and shall perform such other duties as the General Assembly shall prescribe: provided, the General Assembly may require that two Justices, to be chosen by the qualified electors of each County, shall sit with the County Judge in all cases: and there shall be elected, quadrennially, in each County, a Clerk of the County Court, who shall be *ex officio* Recorder, whose compensation shall be fees: provided, the General Assembly may, by law, make the Clerk of the Circuit Court *ex officio* Recorder, in lieu of the County Clerk.

§ 20. The General Assembly shall provide for the compensation of the County Judge.

These sections work an important change in the judiciary system, merging, as they do, the Court of Probate and the County Commissioners' Court into a Court combining the present jurisdiction of both, with a probable increase of jurisdiction by the General Assembly, as also requiring its Clerk to perform the duties of Recorder of Deeds. We do not object to the change.

§ 21. The Clerks of the Supreme and Circuit Courts, and State's Attorneys shall be elected at the first special election for Judges. The second election for Clerks of the

Supreme Court shall be held on the first Monday of June, 1855, and every sixth year thereafter. The second election for Clerks of the Circuit Courts and State's Attorneys shall be held on the Tuesday next after the first Monday of November, 1852, and every fourth year thereafter.

These officers have not heretofore been elected by the people; the Clerks have been appointed by their respective Courts, and the State's Attorneys elected on joint ballot by the General Assembly.

§ 22. All Judges and State's Attorneys shall be commissioned by the Governor.

§23. The election of all officers, and the filling of all vacancies that may happen by death, resignation or removal, not otherwise directed or provided for by this Constitution, shall be made in such manner as the General Assembly shall direct: provided, that no such officer shall be elected by the General Assembly.

§ 24. The General Assembly may authorize the judgments, decrees, and decisions of any local, inferior Court of Record, of original, civil, or criminal jurisdiction, established in a city, to be removed, for revision, directly into the Supreme Court.

§ 25. County Judges, Clerks. Sheriffs, and other County Officers, for wilful neglect of duty, or misdemeanor in office, shall be liable to presentment or indictment by a grand jury, and trial by a petit jury, and, upon conviction, shall be removed from office.

The features of the three latter sections are new and proper.

§ 26. All process, writs, and other proceedings shall run in the name of "The People of the State of Illinois." All prosecutions shall be carried on "In the name and by the authority of the People of the State of Illinois," and conclude, "Against the Peace and Dignity of the same."

§ 27. There shall be elected in each County in this State, in such districts as the General Assembly may direct, by the qualified electors thereof, a competent number of Justices of the Peace, who shall hold their offices for the term of four years, and until their successors shall have been elected and qualified, and who shall perform such duties, receive such compensation, and exersise such jurisdiction as may be prescribed by law.

The first of these sections is taken from the old Constitution, and the other comprises the substance of the corresponding one in the same instrument, with the additional provision limiting the tenure of office.

§ 28. There shall be elected in each of the judicial Circuits of this State, by the qualified electors thereof, one State's Attorney, who shall hold his office for the term of four years, and until his successor shall be commissioned and qualified; who shall perform such duties and receive such compensation as may be prescribed by law: provided, that the General Assembly may hereafter provide by law for the election, by the qualified voters of each County in this State, of one County Attorney for each County, in lieu of the State's Attorneys, provided for in this section; the term of office, duties, and compensation of which County Attorneys shall be regulated by law.

This section authorizes the General Assembly to provide for the election of County Attorneys; and should the power be exercised, the ends of justice would be better promoted.

§ 29. The qualified electors of each County in this State shall elect a Clerk of the Circuit Court, who shall hold his office for the term of four years, and until his successor shall have been elected and qualified; who shall perform such duties and re-

ceive such compensation as may be prescribed by law. The Clerks of the Supreme Court shall be elected, in each division, by the qualified electors thereof, for the term of six years, and until their successors shall have been elected and qualified; whose duties and compensation shall be provided by law.

The thirtieth and thirty-first sections create the judicial divisions for holding the terms of the Supreme Court, and the places for holding them, to wit, at Mount Vernon, Springfield and Ottowa.

§ 32. Appeals and writs of error may be taken from the Circuit Court of any County to the Supreme Court held in the division which includes such County, or, with the consent of all the parties in the cause, to the Supreme Court in the next adjoining division.

§ 33. The foregoing districts may, after the taking of each census by the State, be altered, if necessary, to equalize the said districts in population; but such alteration shall be made by adding to such district such adjacent County or Counties as will make said district nearest equal in population: provided, no such alteration shall affect the office of any Judge then in office.

These sections close the article on the judiciary department. The sytem has been very materially changed, and will, we think, be found to be an improvement upon the existing one. If the appointing power had been vested in the Executive, subject to the confirmation of the Senate, instead of election by the people, and the salaries of the Judges had been at least one third more, the system would have been much more conformable to our humble notions. We confess to certain early prejudices upon the subject, of which the lapse of years has only tended to convince us of their propriety.

Among the several committees of the Convention, was one on *Law Reform*, composed of some ten or a dozen lawyers. When it was announced, our first impressions were those of a deep concern lest the mighty fabric of the law, the labor of years, should be shaken to its very centre. We were somewhat relieved, however, on ascertaining, from an inspection of the names of the committee, that a majority of them were rather on the conservative order. What that committee, or a portion of it, *did*, and what the Convention *did not*, will be noticed hereafter.

G.

TENANCIES FROM YEAR TO YEAR IN OHIO.

[By N. Headington.]

Concluded.

The plaintiff being in possession of the premises, an entry thereon without right is a trespass—continuing to hold after the entry is but a continuance of the original trespass,—and if such holding be afterwards accompanied with force, it is but adding violence to what was before a wrong; and may be strictly considered a forcible injury to the original possession. Where there is a right of entry, however, it may be said that if the party comes peaceably into the possession of his own property, he may lawfully retain that possession by force,—that a man cannot be a trespasser on his own freehold,—and that the entry not being unlawful the subsequent forcible detainer will not be. Such entry and detainer were without any doubt allowable before the statutes upon the subject were enacted; and the only question then seems to have been, whether the right of entry might not be exercised even by force. 1 *Hawk. C.* 28, §1, *and note.* Since the statutes a forcible entry is clearly unlawful. The only doubt that can now arise is, whether a person having a right of entry, and having entered peaceably, can be guilty of a forcible detainer. "If a man holds the possession by force though his entry was peaceable, the justices may remove him if he had no right to enter; but where the entry is at first peaceable and lawful, there, whether the justices may remove a forcible detainer where it hath not been peaceably holden for three years, is a question; for that the justices are not judges of the right but of the possession only; and if a man be gotten peaceably into possession of his own, it seems he may defend it by force." 3 *Bac.* 253. The reason here given is believed to be conclusive, the other way however. The possession and not the title is in controversy, and without some evidence of title a party who enters adversely upon the possession of another, stands in the light of a trespasser, and if such evidence is not admissible, although having a right of entry, he may be convicted of a forcible detainer. The rule is without qualification or exception, that in an action of forcible detainer the title cannot be investigated. And the only other course that could be pursued consistently with its preservation even in name, besides a total exclusion of this kind of evidence,

would be to allow the defendant to show a color of title in himself, and if this could be done, refuse relief to the plaintiff and require him to bring an action in which its merits might be tried. This, however, would narrow the remedy down to the case of a trespasser without color of title: it would often deny relief to the plaintiff where the right was actually in him; it would encourage those having doubtful claims to endeavor to gain possession without process of law, and thereby give rise to disturbances of the public peace, to prevent which the statutes were enacted. So long then as the merits of the title cannot be examined, the presumption in favor of the prior possession should be allowed to hold good. And the universality of the rule, that the title cannot become the subject of inquiry, will not admit any other conclusion than that the action may be maintained as well against those who enter under a claim of right as against those who enter without any such pretence.

Thus far it has been supposed, that the entry of the defendant was adverse to the title of the plaintiff. There are cases, however, where it is made under and consistent with such title to which the same general principles apply,—which come within the like mischief, and are, it seems, subject to the same remedy. If the defendant derived his title and possession from the plaintiff whilst his estate continues, he has the right of possession against the latter and may maintain it by force. But if his estate has expired or been determined, he cannot afterwards justify retaining the possession on the ground that it was at first lawful, but by holding over becomes a trespasser as much as though his original entry had been without right. His possession being at first friendly to and consistent with the title of the plaintiff, is to be regarded as merely a continuation of the possession of the latter until it becomes adverse by holding over, when it operates a disseizin, and is such an injury to the possession of the plaintiff as with any circumstances of violence or terror superadded, will amount to a forcible detainer. That such cases fall within this denomination is evident from a limitation of the action introduced by the statute of 31 Eliz., and copied into many of the American statutes, and amongst others, the first two acts in Ohio. 3 *Bac.* 252; *Chase* 190, 484. It is thereby provided, that restitution shall not be awarded against one who has been in quiet possession for three whole years together, "and his estate therein not ended," thus clearly indicating that the action may be supported against a person who has had a limited or determinable estate which has already been determined. The appropriateness of the remedy

in this class of cases will appear moreover from the fact, that in them upon general principles the title cannot come in question; the defendant so long as his possession continues being estopped to deny the title of the plaintiff. Amongst others it includes such as arise from the relation of landlord and tenant. As far as the latter are concerned, it appears that the same strictness of proof is not required which is usually necessary to establish the prior possession of the plaintiff and the entry thereon by the defendant. Some evidence of these facts is indeed essential in all cases; but, as against a tenant, it would seem that proof of the tenancy merely in any other manner is conclusive of their existence.

The authorities on this part of the subject are somewhat meagre: such as there are, however, are direct, and sufficient to sustain the propositions that have been stated, whose correctness in principle, it is believed, will not be denied. In the early case of *Snigge* v. *Shirton*, *Croke Jac.* 199, Shirton being tenant for years, Baron Snigge purchased the reversion, and he paid to him rent for fifteen years. Before the end of the term he was persuaded to take a lease of another person, and after the term had expired, kept the possession with force. It was held, "that the possession of the termor was the possession of the lessor; and when at the end of the term he kept it with force against him to whom he had so long paid his rent, it was a forcible detainment. And whereas the statute, 31 *Eliz. c.* 11, is that where one hath had possession for three years quietly, he might hold the possession with force, that is to be intended where the estate is continued." This case is referred to and recognized in 4 *Blacks. Com.* 149, *n.*; 1 *Hawk. c.* 28. §30, and *Com. Dig. For. Ent.* (*B* 1.) It is also said in Comyn, "So it shall be a forcible detainer if a lessee at will detains with force after the will is determined." Ibid, citing *Cromp.* 70 *b.* A person, therefore, whose entry was originally lawful, but who afterwards holds over without right and by force, is as much subject to the process of forcible detainer as if he had been a trespasser in the first instance.

In order to make out a case of forcible detainer, then, there must be evidence to establish, 1st, possession in the plaintiff; 2dly, a peaceable entry upon such possession by the defendant, either (1,) adversely whether with or without a claim of title, or (2,) under a limited or determinable estate which has expired or been determined; and 3dly, a holding attended by circumstances of actual violence or terror.

Tenants from year to year, as well as others having a determinable estate, can only be guilty of a forcible detainer after their estate has been determined. Before this is done, they have a present legal interest in the premises with a right to their exclusive occupation, and may therefore maintain the same by force; afterwards by holding over they become trespassers upon the possession of their landlords, and if they prevent the latter from re-entering, either by actual violence or threats of violence, they are liable to be proceeded against for a forcible detainer. According to the common law of Ohio, however, a tenancy from year to year can only be determined on the part of the landlord by a six months' notice to quit; and it is clear that before the statute of 1821, such notice must have been proved to enable him to recover in a case of this kind. That statute was the first to require, that where forcible detainer only was alleged in the complaint, a notice should be given to the defendant ten days before issuing the writ: a provision of this kind—its operation having been extended to cases of forcible entry and detainer, and the length of the notice reduced to three days—is still in force. It did not change the description of the persons against whom the writ might be issued; this has always been since the act of 1795: "those who having a lawful and peaceable entry into lands or tenements unlawfully and by force hold the same." It did not change the nature of the proceeding, or the circumstances under which it might properly be brought. It did not change the form of the complaint, the allegations necessary to be made therein, or the proof which would be required to sustain those allegations. Evidence of a six months' notice to quit having, therefore, been before essential for the purpose of supporting the charge of forcible detainer against a tenant from year to year, and the nature of that charge remaining the same, such notice must still be shown in addition to the notice required by the statute.

In a large majority of the cases, however, where this action is resorted to with a view to recover the possession of premises from a tenant, no actual forcible detainer has taken place. These, therefore, evidently do not come within the general terms of the law; and must be sanctioned by some special enactment enlarging its application. The 19th section of the act of 1831, *Swan* 421, declares, "That proceedings in this act may be had in all cases against tenants holding over their term," against a judgment debtor in the possession of real estate sold on execution after the sale has been confirmed and against a settler or occupier without color of title. It

has been contended by some, that this section limited the action of forcible entry and detainer to the cases therein enumerated. This doctrine was overthrown in the case of *Yager* v. *Wilber* before cited; in which the Supreme Court after ascertaining the meaning of the expression, forcible entry and detainer, as implying actual violence, proceed to show that the above section was not contained in any of the laws of the State until 1823, and conclude that it was intended to enlarge the previous remedy, by bringing within its scope a new class of cases not necessarily attended with force. A statute has since been passed, authorizing the purchaser of lands forfeited and sold for taxes, to recover possession of the same by an action of forcible detainer. 44 *O. L.* 115. These are the only special provisions enlarging or defining the extent of this proceeding; and the only class of persons therein mentioned that concern the present inquiry, are tenants holding over their term. The above case has settled the question which it decided: it need not now be examined therefore, and there seems not to have been originally any reasonable or sufficient ground for entertaining the rejected opinion. With regard to tenants holding over their term, this enactment would clearly be useless as far as they are concerned, if evidence of force should still be required, since such evidence would bring them within the operation of the previous law.

"Tenants holding over their term," although without force, are therefore liable to be proceeded against in the same manner as if they were guilty of an actual forcible detainer. The first and most natural impression produced by this form of expression is, that it will only apply to those having an estate for years. A term is an interest in land, which must expire at a period certain and prefixed; the very essence of such an estate consists in the fact, that from its commencement the *terminus* or limit of its duration is absolutely defined. 2 *Blacks. Com.* 143; 1 *Thomas' Coke* 631, 632, *and notes.* Tenancies from year to year, on the other hand, are uncertain in their duration,—they are a creature of the courts, moulded out of the original tenancies at will,—and are still said to be such for all purposes except as to the notice to quit. 7 *John.* 4, 5; 4 *Cow.* 349. Like the latter, they continue without interruption until they are regularly determined; there is no expiration and renewal of the estate at the end of each year; and it is only said to be permanent from one year to another, because it cannot be determined at any other period, and not because it then ceases and is revived.—Although such tenancies can only be made to expire at the end of

the year, until the six months' notice to quit is given, their duration is as uncertain as that of estates at will,—they may be determined at the end of the first year, or they may be permitted to last for ten or twenty years. The notice when given, however, appears to confer upon them all the properties of estates for years,—it fixes the limit beyond which they cannot extend, and thereafter they become in all respects like, if not in fact, terms for years. To this effect is the language of Lord Kenyon in 7 *T. R.* 432, who says: "Here is a tenant from year to year, whose term expired upon a proper notice to quit." Before the notice is given, then, tenancies of this character are as indefinite in their extent as tenancies at will, afterwards as definite and certain as estates for years; and when it has expired, if the tenant still retains possession, he may with propriety be called a tenant holding over his term. This is the only manner in which the estate can be determined, or such tenant brought within that denomination.

The statute declares, that proceedings in this act may be had in all cases against tenants holding over their term. What such proceedings are is pointed out therein, and amongst other things, the notice three days before issuing the writ is required.—But before they can be instituted against a tenant from year to year, there must have been a six months' notice to quit for the purpose of determining his estate—for the purpose of making him a tenant holding over his term. Such tenants are, therefore, entitled to the six months' notice of the common law in addition to the three days' notice given by the statute, as well where the unlawful detainer is without force as where it is forcible. The former is necessary, and must be proved in every action of forcible detainer to bring them within the description either of "those who having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same," or of "tenants holding over their term," under one or the other of which classes they must fall before the statute will apply to them. As without the common law notice, they cannot be made trespassers in an action of ejectment, neither can they without such notice, become trespassers under and liable to be evicted by the concurrent remedy of an action of forcible detainer. Their estate must be determined, and a subsequent holding thereby rendered unlawful, before any proceeding can be commenced to deprive them of the possession.

That the statutory notice was not intended to annul or supersede

the existing common law notice will further appear from the fact, that they are not co-extensive in their application, nor required to be given so as to expire at the same time. The former originally extended to all cases where forcible detainer only was alleged in the complaint, whether against tenants from year to year, or against tenants for years, judgment debtors, occupiers without color of title, persons unlawfully holding by actual violence after a peaceable entry, or at a later period, persons in possession of premises sold for taxes; none of whom but those first mentioned, would otherwise have been entitled to any notice: and according to the present law, it is likewise enjoined in all cases of forcible entry and detainer, thus going still further beyond the limit assigned by the common law to a notice to quit. There must have been some other object, therefore, in its establishment than to furnish a substitute for the common law notice. The latter was not necessary in the case of a tenant for years, to take an example, because the time at which the estate would expire would otherwise be known to each party; and such tenant without notice was therefore on as good a footing, as far as the opportunity to prepare for removal was concerned, as a tenant from year to year after it had been given. Whatever reasons existed then for allowing the three days' notices in all the other cases to which it is made to apply, operated in at least an equal degree to require that as to tenants from year to year, it should be given, not in place of, but in addition to the regular common law notice. Again, the latter must be made to expire at the end of the year. The only time specified in connection with the former is, that it shall be given three days before the writ issues. As against all other persons except tenants from year to year, it can be issued any time after the cause of complaint is complete, after the right of action accrues, and not before. As far as they are concerned, however, the statutory notice being regulated by the time when the writ can issue, if there is no common law notice to quit, there is no reason why it may not be issued at one time as well as another. The tenancy does not of itself expire at the end of the year any more than at any other period, and the action may therefore be commenced against a tenant from year to year, if at all, at any time during the year, provided there has been a previous notice for three days. That such a notice must terminate with its termination, is a mere assumption entirely unauthorized by the statute, and not warranted by the nature of the tenancy, except as a consequence of the six months' notice, and even in connection with the latter it may, as in

other cases, be given at any time after the estate has been determined, and the cause of action has thereby accrued. Even if made to expire at the end of the year, it would entirely fail to answer the purposes which the common law notice was intended to accomplish —on account of its limited duration it is utterly worthless as a notice to quit. The shortness of the statutory notice, then, the fact that it is required in all cases of forcible entry and detainer, and that the time at which it is to be given, is only indicated by its relation to an action afterwards to be brought, together with the considerations that have been before referred to, lead to the conclusion, that it was not meant to supersede the common law notice, but that its object is, so far as can be, to do away with the necessity for litigation under the statute, by affording persons subject to be proceeded against thereby, a fair and sufficient warning that an action is about to be commenced, and allowing them time to avoid the trouble and expense attendant thereon by removing from the premises.

In the beginning of this article, it was contended that the common law as a system was in force in Ohio, and as a necessary consequence, that portion of it regulating tenancies from year to year, if not inconsistent with our political institutions, or unsuited to our circumstances and state of society,—unless our courts had finally settled by their decisions that it came within this exception,—or unless it had been repealed by statute. An attempt has since been made to show by an examination of the reported cases bearing upon the subject, that although not in themselves conclusive in favor of such tenancies, they are far from sustaining the opinion of those who deny their existence: and that the statute requiring a ten days' notice in the action of ejectment, the statute of frauds, and the forcible entry and detainer act, which only, of all our statutes, can be thought in any manner repugnant thereto, do not conflict with the notice to quit, or prevent their complete efficacy in every other respect. It is not intended to recur to the reasons establishing the general obligation of the common law within the State,—they are too obvious, and it is believed too well recognized to require any further notice,—and should rather be treated as beyond the reach of denial or debate. Neither is it necessary to say any thing further as to the adaptation of the doctrine of tenancies from year to year to our circumstances, which indeed is not known as yet to have been directly controverted. The courts of the several States have seldom rejected any part of the common law for want of such adaptation. It is a right which should be exercised by them with extreme caution

and only upon plain and indisputable grounds,—which in all ordinary cases, or where there is room for a reasonable doubt even, should be left to the legislature to whom it more appropriately belongs. Nor can the absence of an express adoption of this part of the common law, either in itself, or as an index of the opinion of the profession, be urged with any force or justice against its existence. That it affords any evidence of a general opinion adverse thereto, is denied. And neither should that want of recognition, nor the prevalence of such an opinion,—admitting it to be general—which, upon a question presenting an equal weight of argument or authority upon either side, would certainly be entitled to respect—avail any thing when opposed to propositions so plain and well settled as that the common law is in force in Ohio, and that the doctrine of tenancies from year to year constitutes a part of the common law.

If the preceding remarks have been prolonged to an unreasonable length, the only excuse that can be offered, is the immediate and practical importance of the subject. No position has been assumed or argument advanced, but with a full and sincere conviction of its correctness, and with a view to direct the attention of those more immediately concerned with the administration of the law of our State, to the great uncertainty that has been permitted to prevail in this part of it. And, in conclusion, it will be allowable to express the desire, that wherein error may be found in what is here submitted, it may be pointed out,—and that the discussion of the subject may be continued until it is finally put at rest by a well considered decision of our court of last resort,—a result to be desired as well for the relief of the profession from serious and unnecessary embarrassment, as for the good of the community at large.

CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA: BEFORE JUDGE McLEAN, AT CHAMBERS, SEPTEMBER 25th, 1847.

HENRY VALLETTE *v.* THE WHITEWATER VALLEY CANAL COMPANY.

[FROM THE NOTES OF JUDGE McLEAN.]

To enforce an equitable lien is the appropriate jurisdiction of a court of equity.

The Circuit Court takes jurisdiction for or against a corporation, from the place where its business is done.

And this sufficiently appears from the face of the act of incorporation.

The citizenship of persons who may or may not afterwards apply to be made parties need not be alleged in the bill.

The rights of persons, not made parties, cannot be affected directly by the proceeding in a suit; but a question which is raised between parties, may affect them, as the holders of certain paper.

A complainant may consent to the postponement of his lien in whole or in part, on conditions beneficial to all the parties concerned.

But the Court cannot change a contract, under any exigency.

VALLETTE filed his bill to enforce a lien upon the Whitewater Valley Canal, and applied for a preliminary injunction to restrain the officers of the company from doing certain acts, prejudicial to his lien, and also for a Receiver. The application was fully argued by Mr. Fox and Mr. CHASE for the complainant, and by Mr. J. S. NEWMAN and T. WALKER for the respondents.

Judge McLEAN gave the following Opinion:

This is an application for an injunction and the appointment of a receiver.

The bill alleges that on the 20th day of January, 1842, the legislature of Indiana passed "An act to incorporate the Whitewater Valley Canal Company," with power to make contracts, sue and be sued, and do all things necessary to effectuate the objects of the association. And in the same act, the State transferred to the association all its rights to the line of the Canal from the Ohio river to the National Road, at Cambridge, and all the expenditures by the State thereon, on condition that after the lapse of fifteen years, and after the completion of the Canal by the Company, the State shonld have the right to resume the Canal, with the privileges granted, "upon paying to said Company the full amount of their expenditure upon the same."

Power is given to the corporation to borrow money, and when necessary to increase the stock of the Company—to erect mills and other hydraulic works, to fix the rate of tolls, &c.

After the organization of the Company, by the election of its officers, they created a loan for the benefit of the corporation, of one hundred and twenty-five thousand dollars, and for part thereof, issued bonds for the payment of one thousand dollars each, one hundred and twelve of which bonds bearing date 1st of January, 1845, were issued and delivered to the complainant, payable to him or bearer. On these bonds, interest at the rate of seven per cent., was payable semi-annually, at the city of New York, until the payment of the principal sum, which was payable in ten years, being part of the first and only loan of one hundred and twenty-five thousand dollars: and the faith of the Company and their effects, both real and personal, were inevitably pledged; and said bonds were to have a preference over all debts that might thereafter be created by the Company.

And in default of said payments it was agreed that the holders of the bonds might enter immediately into the receipt of the tolls and water rents, and the incomes of said Company, by applying to the Circuit or District Court of the United States, or any court of justice to appoint a receiver of the incomes of said Company, and apply the proceeds to the payment of the interest on said bonds, &c. And it was agreed that should the interest have to be collected by legal process, there should be adjudged to the holder ten per cent. as liquidated damages.

The Company also executed to the complainant four other bonds of similar character and amount, except as to their date and time of payment. Two of these bonds are now due, and the other two will be due in July next. That there is now due the sum of five thousand seven hundred and fifty dollars for interest, and also one thousand dollars on the obligation which became due in July, 1847, which it seems the defendant refuses to pay. And the complainant states that the corporation has, within a few months, contracted other debts, and has in violation of law, caused about seventy thousand dollars in bonds to be prepared to be issued, and has issued about twenty thousand dollars of the same, and threatens to issue the balance thereof, for the purpose of being used as a circulating medium, and as a substitute for bank notes, in the form of promissory notes, by which said Company promises to pay two years after date to ——

or bearer five dollars, (and other notes from that sum to twenty dollars,) for value received, with interest at the rate of six per cent. per annum; and which notes on their face are agreed to be received by said Company, at all times for tolls and water rents, &c.

And the complainant avers, that the corporation has lands and personal property, debts due and cash on hand to a large amount. That the corporation owes, as he has been informed, over two hundred thousand dollars. That if the said notes be received in payment of tolls and water rents, the sum due to the complainant as aforesaid, cannot be paid; and he prays that the defendant may be enjoined from selling or disposing of any of the real or personal estate of the Company, and from issuing or circulating any promissory notes of the character before described. Also from receiving them for the tolls and water rents due and to become due.

In its answer the corporation admits, the organization of the Company, the issuing of the bonds and the sum due to the complainant as alleged by him. It states that by a great rise of water in White river an extensive injury was done to the canal, to repair which ninety thousand dollars were required. That these injuries if not speedily repaired would have been ruinous to the canal. That failing to raise funds to make the repairs in any other manner, the plan of issuing the promissory notes complained of was adopted. These notes the defendants insist are not in violation of law.

Several objections were made to the jurisdiction of the Court.

1. That there is a remedy at law.

This is an equitable mortgage, and is a peculiar subject of equity. The objects of the complainant are clearly not attainable at law. He may recover a judgment against the corporation, but its tolls and water rents cannot be reached in that form. And it appears from the face of the contract, these were looked to by the parties as a means of payment. This remedy is incorporated into the contract, and it is a part of it. On the tolls and water rents, therefore, the plaintiff has a lien preferable to all others now shown, which may be enforced in a court of equity, but cannot be in a court of law. And this is the main object of the bill.

2. It is also insisted that it does not sufficiently appear that the place where the corporation does its business, is within the State of Indiana. To this it must be answered, that the place where the functions of this corporation are discharged must, necessarily, be within the State of Indiana. It can exercise no extra-territorial

power on this subject. But from the face of the charter, it is seen that the work to be accomplished is within the limits of the State.

3. It is further objected, that the complainant was for himself and others interested, and that it does not appear who those persons are, and that some, or all of them, may be citizens of Indiana, who could not come in as co-plaintiffs. If this supposition be true, it would be a sufficient objection to their being made plaintiffs. They are not now plaintiffs, and this objection may be considered when they shall apply to be made so.

4. Again, it is insisted, that the rights of the holders of the promissory notes alleged to be illegal are involved, and that they should be made parties.

So far as the question of illegality is concerned, it is not material that they should be made parties. Whether these notes be in violation of law, is distinctly presented by the prayer of the bill, that the corporation should be enjoined from issuing any further notes of similar character, which they are about doing, and which, it is alleged, they have no power to do. As well might it be objected, when a defence is made involving the legality of a promissory note, that the rights of others holding similar notes would be effected. If these notes, now in circulation, are to be treated as valid, and the question is made, whether the payment of them out of the tolls and water rents, as pledged upon their face, the objection that the holders are not made parties, is not without force. In this aspect, the question is one of preference, and that point is not raised in the bill; and it is supposed could not be, unless the holders of the paper were given.

5. The State of Indiana is not a necessary party. Its interest is contingent, depending upon the exercise of its own discretion.—And this proceeding can in no respect affect the exercise of that discretion.

The lien of the plaintiff is the first one, as appears from the bonds, and, it was expressly agreed, that it should be preferred to all others. But, of necessity, there was an implied understanding that the ordinary expenses of the company should be paid. Until this was done there could be no tolls or water rents to pay out. But this expenditure is limited to ordinary repairs and other expenses, incident to the business of the company. The Directors could give no lien, to the prejudice of the plaintiff, beyond this. The work was subject to casualties like other and similar works, but no provision was made for extraordinary expenditures. When these became

necessary, as under the circumstances stated in the answer, the Directors should meet them, if possible, by the use of other means, than those which were mortgaged to the plaintiff. They had lands, debts due for stock and otherwise, and they had power to increase the stock of the company. If these should not be available, after a full trial, and a pledge of the receipts for tolls and water rents was the only means to raise the money to make the repairs, within the power of the Directors, it was a subject rather of compromise between them and the complainant, than of legal discretion on their part. The lien may have been given to the complainant injudiciously, but it was given under an emergency as strong, and indeed stronger, than that which now exists. The means afforded by the plaintiff enabled the Company to accomplish the enterprise. The lien given to him induced him to part with his money, and no change of circumstances in the affairs of the Company can authorise a postponement of the lien.

The interest of the parties in this case is identical. Unless the canal be repaired, the expenditures of the Company will be lost, and the work in a short time become of little or no value. And in this event the claim of the plaintiff must fall and become as worthless as the stock of the Company. It would seem, therefore, in reason and policy, that the future receipts of the Company should be used to make the repairs now being made, so far as may be done with a proper regard to the interest of the plaintiff. And he voluntarily proposes to postpone his lien for ninety days, provided the receipts of tolls and water rents, during the ninety days, shall be applied to the completion of the repairs. And after the expiration of the ninety days, he consents to receive one-fourth of the receipts for toll and water rents.

Beyond the ordinary repairs of the canal and the expenses of the Company, it can create no demand which shall directly or indirectly postpone the lien of the complainant. The faith of the Company is not only pledged for the priority of his lien, but its entire property and especially the receipts for tolls and water rents. The tolls and water rents are not only pledged equitably, but they are set apart as the means of payment. This being the contract, the Company cannot change it, nor can the Court do so. Courts of equity do not make contracts, but enforce them. As the complainant, however, has consented to the postponement of his lien, as above stated, that all the means of the Company may be applied to the repairs now being made, all difficulty on this point is obviated.

The sale of the lands of the Company for its stock, lessens so much the property mortgaged to the plaintiff—the lien extended equally to the stock and the land, though the stock was held by individuals—the exchange of the land, therefore, for stock, did not add to the amount of stock, but reduced the subject of the lien, to the amount of land sold. This the plaintiff may object to, as it lessens his security.

The promissory notes of small denominations, printed on bank paper, and containing a promise to pay, with interest, a certain sum, and receivable for tolls and water rents, signed by the President and Secretary of the Company, being evidently intended for circulation, are clearly within the act of Indiana of the 20th January, 1841.

Upon the whole I think the complainant is entitled to the prayer of his bill to enjoin the corporation from issuing notes of the denomination above stated, and from receiving such notes already issued in payment of tolls, water rents, or other dues; also from selling any of the real estate now held by the corporation for its stock. And after the canal from Cambridge to the Ohio river shall have been in operation from this time, three months, the receipts having been faithfully applied to the completion of the necessary repairs, the Company is required to set apart one-fourth of the receipts for the payment of the plaintiff's demand; and that the same shall be paid to the plaintiff, or deposited in the Lafayette Bank of Cincinnati, subject to the order of the Court.

And it is further ordered, that the corporation shall, by its proper officer or officers, make a report to the next Circuit Court of the United States, to be held in the State of Indiana, stating the receipts and expenditures of the Company from the time this injunction is allowed up to that term, and that another report of the same character be made at the succeeding term of said court, if the plaintiff's demand shall not be discharged before that time.

A receiver will now be appointed. And I take occasion here to remark, that I have no doubt the Company has acted, under the exigencies in which it was placed, with a sincere desire to advance the general interests of the association and the public.

DECISIONS OF THE COURT IN BANK, 1846-7.

[By W. M. Corry.]

King *v.* King.

This case was determined on a bill of review; and induces the scrutiny of probably the most obscure province of the intricate law of real property. In my opinion, by this decision error records itself triumphant over recorded truth, in the same tribunal, on the same issue, and between the same parties. The question presented to the Court arose on this clause of Wm. King's will, who died previous to 1840:

"If it so please God that at the time of my decease, I should die without any lawful heir or heirs, born in wedlock, in such case I will and bequeath all the property I may be possessed of before my decease to my brother Christian, without any reservation, to be used by him while he lives; and if it so please God that at the time of brother Christian's decease, he should be possessed of a legal heir or heirs, born in wedlock, I then will and bequeath all and every kind of property which may be considered mine in my life time, and of which the said Christian may be seized, at the time of his decease, to such heir or heirs, and no other. But should I myself die without lawful heirs, and also my brother Christian die without heirs born lawfully, as above stated, I then will what may be considered my share, after my brother's decease, and not before, to my two sisters' children, Ish and Cassell, in equal dividends or shares, and not to be used by any of them until they come of the age allowed by law."

The testator died childless possessed of personal and real property. C. King survived him and died, leaving heirs of his body. The sisters of the testator had children living both at the death of the testator, and at the death of C. King. C. King's administrators applied for leave to sell the devised land to pay his debts.

The original case now reviewed and reversed was decided by the Court in Bank, in 1843, per C. J. Lane; and is to be found most laboriously argued in 12 *O. R. pp.* 390, 474. The construction then put by the Court upon the devise in question, is thus expressed in the syllabus to the opinion: "A devise to A for life, and after his decease, to the heirs of his body, and, failing heirs at his decease,

then over, is an estate tail in A. Where such a devise of land contains a power to use, and the limitation over is only of what A shall die seized of, the estate of A is a fee simple."

The construction now put upon the same will by the Court in Bank, per Read, J., 15 *O. R.* 559, is, that "A devise of realty to one and his heirs, to be used by the devisee for life, with remainder over to a third person, will not vest the fee in the devisee, under the rule in Shelly's case, if such construction will defeat the manifest intention of the testator. The words 'heir or heirs,' in a will, if such was the clear intent of the testator, may be construed child or children, and they will take as purchasers."

I propose shortly to abstract the adverse grounds upon which these contradictory decisions rest as they are expressed in the respective opinions, and afterwards to give some of the reasons and authorities on which I think the decision in 12 *O. R.* 390, ought to be reinstated as the clear rule of law in this State. It will be unnecessary to embarrass the great inquiry, respecting the title to the land devised, by any reference to the disposition of the personal property which does not bear upon the main question. I shall, therefore, leave it out of the abstract, and confine my own remarks to the title of the realty.

C. J. Lane says, "This will reduced to its simplest terms, contains the following propositions:

1. A devise of real and personal property to C. King.
2. After his death, to the heirs of his body.
3. If he die, leaving no heirs of his body, then to be divided equally among his sisters' children.

If Christian took an estate in fee, the lands descended to his heirs general, charged with his debts. If he took an estate tail, the land at his death, by our statute of entails, (*Swan* 319,) belongs to the heirs of his body in fee. If he took an estate for life, the land at his death passed to the heirs of his body in fee, unless the will contain other provisions, which make the title absolute in the first holder. We are led at once to Shelly's case for the law which governs this. The rule is, that where a freehold is limited to one for life, and by the same instrument, the inheritance is limited, either mediately, or immediately, to his heirs, or to the heirs of his body, the first taker, takes the whole estate either in fee simple or in fee tail, and the word "heirs," or "heirs of his body," are words of limitation, and not words of purchase. This will contains the essential elements by which the limitation of the estate it creates is subjected to

the operation of this rule. We find the legal freehold in the devisee, and a legal estate in his heirs, limited by way of remainder."

The Chief Judge concludes, therefore, that C. King took the estate according to the Shelly rule, instead of a mere life estate; and that he took a fee simple, and not a fee tail, because the devise gave him a complete power to alien or dispose of the lands, &c., which implies absolute property. He answers several objections to this construction shortly, as follows:

First: The words of the devise, "to be used by him while he lives," do not prevent the application of the rule. 1 *East.* 229; 4 *M. & S.* 362; 2 *Ves. Jr.* 225; 1 *Bur.* 38; 3 *Brown, p. c.* 180.

Second: The words "heir or heirs" do not indicate a particular person, but a line of descent. *Amb.* 453; 2 *Ver.* 324; *Styles* 249; 2 *Roll.* 194.

Third: The devise over to the children of Ish and Cassell equally, does not control the limitation to Christian's *heirs*; *although* "*if the devise had been to C. for life, remainder to his children and their heirs, and in default of C. issue, a limitation over, the children of C. would take a contingent remainder as purchasers,*" *&c.* [In the sequel we shall see how the really immaterial error of the *last* admission was seized on by the Court to reverse the other sound reasoning, and the logical conclusion of the learned C. Judge.]

Fourth: The expressed intention of the testator, that if Christian died without heirs of his body, the estate shall then vest in his sisters' children, does not prevent the application of this rule. 7 *Taunt.* 209.

Fifth: Our statute of entails, prescribes only the mode of holding, not of transmitting lands, and does not interfere with the rule.

This decision unfettered the estate, and made it subject to the claims of the creditors. From these creditors, it was wrested in manner following at the last session in Bank:

Judge Read premises, that if a testator do not seek to create a perpetuity by his will, his intention with regard to his estate is to be the guide of construction. He then states, that it was as lawful for the testator to give his brother a life estate, with remainder in fee, as to give him the fee simple, or a fee tail. But he admits that "if the estate for life, created in the devisee or donee is limited precisely as it would descend at law, the rule in Shelly's case vests the entire fee in the first devisee or donee;" and at the same time claims that while that rule is an undoubted law of property, it is not a rule of construction. He is very severe upon the rule itself. He styles

it "a family law in England, designed to build up families, cheat creditors, and prevent forfeitures, and in no wise consistent with the spirit and genius of our own government and laws, or the habits and feelings of our people." That "it had its origin in feudal tenure, and was first adopted to secure the lords the profits and perquisites incident to inheritances, and as an after-thought, the additional reason that it was necessary to prevent an abeyance of the fee. It is at best a mere artificial technicality, and just in proportion as it lacks reason, it appears to have won upon the affections of the profession."

Having laid down these preliminary views of the Shelly rule, he asks, what is the testator's intention in the present case? and then follows his very brief argument, all turning on the error made by C. J. Lane before mentioned.

The learned Judge observes, that all the doubt upon the construction of the will grows out of the employment of the words "heir or heirs," but that if those words had been "child or children," they would have been clear words of purchase; and says that the testator may use the former words in the latter sense. This he supposes will be conformable to law, and gives effect to the intention of the testator, which was to devise the express life estate to Christian King, and the contingent remainder over to the children of testator's sisters, on the failure of Christian's issue at his death.

This is all the learned Judge advances by way of argument, to show that the Shelly rule does not apply so far as to create a fee tail in Christian King, as the C. Judge, in 12 *O. R.* 390, thought it would, upon the construction of the words of the will, leaving out the power of absolute disposition also conferred on the devisee.—But in answer to the conclusion of the C. Judge, that in consequence of that power, the fee tail became a higher estate in fee simple, the learned Judge argues, that if that were so, then the testator did a vain thing in conferring the contingent remainder upon his sisters' children. He adds, "it may be said he was ignorant of the rules of law. The presumption is, that he knew the law, and that he employed the words "heir or heirs" in such sense as would permit the remainder to vest on the happening of the specified contingency." "The words 'heir or heirs' must be read child or children. It has already been stated, that the words 'heir or heirs' may be treated as *designatio personæ*, or as child or children, if the manifest intent of the testator require it."

The learned Judge admits clearly, that the rule in Shelly's case is a law of property in the State of Ohio; but evidently holds it in the very lowest estimation.*

With proper deference I shall endeavor to show in this review, that all the material positions of the Court in the case are untenable. I will show,

1. That the rule in Shelly's case is a natural key to the interpretation for devises to which it is applicable.

2. That it is a reasonable rule of property.

3. That it is congenial to our institutions.

4. That it is applicable to the case according to the reasoning and authorities which are most reliable, as the will actually reads.

5. That not even the interpolation of "children" for "heirs," in the devise to C. King, will take the case away from the grasp of the rule according to the law of descents in Ohio, although it would be otherwise in England.

Let us briefly consider these propositions in their order:

First, that it is a natural key to the interpretation of devises distributing estates.

A limitation to A. for his life, remainder to his heirs, or the heirs of his body, differs in sound only from a limitation to *A.* and his heirs, or to *A.* and the heirs of his body. Chief Baron Gilbert, Blackstone, Hargrave and Fearne, give this as a principal reason for the rule. Where the estate is so given, that after the limitation to the first taker, it is to go to every person who can claim as heir to the first taker, the words used, must be words of limitation. Per Lord Thurlow, 1 *Bro. c. c.* 218. And even where the testator has two intentions, as we shall see in the next paragraph, it is the only mode of carrying the general one into effect. Chancellor Kent says, 4 *Com.* 229, "All the modern cases contain one uniform language, and declare that the words, *heirs of the body*, either in deeds or wills, are construed as words of limitation, unless it clearly appears, that they were used to designate certain individuals an-

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* See *McFeely's Lessee* v. *Moore's Heirs*, 5 *O. R.* 464, where it was held, that a devise to Walter and Phebe of the use of two tracts of land during their respective lives, followed by a declaration, that at their decease said tracts should descend to their heirs, vested a fee simple in Walter and Phebe. Like *King* v. *King*, this decision was on a will made after the passage of "the act to restrict the entailment of real estate," passed Dec. 17, 1811. (*Swan* 319.) That statute enacts, that the issue of the first donee in tail shall take an absolute estate in fee simple.

swering the description of heirs at the death of the party." If the testator uses a term which taken in connexion with the context, is of as large an import as heirs of the body, it follows that he has indicated that course and mode of succession which the writers on the rule in Shelly's case have so anxiously marked as attracting and requiring its application. See *Hayes on Entails*, proposition 8, and the tables.

Second: That it is a reasonable rule of property.

In *Loe* v. *Smith*, 7 *T. R.* 531, Lord Kenyon took a distinction between the general and the secondary intention in a will, and he held, that the latter must give way when they interfered. If, therefore, the testator intended that the first taker should take only an estate for life, and that his issue should take as purchasers, yet if he intended that the estate should descend in the line of hereditary succession, the general intent prevails, and the word "issue" is a word of limitation. As observed by Mr. Hayes, (an English author,) in his treatise on the disposition of real estate, *p.* 94, "The rule says, (to state it briefly,) that whenever a limitation of land to A. for his life, on any other estate of freehold, is followed by the limitation of a remainder to his heirs, or the heirs of his body, the latter limitation shall have the same effect as if it had been made to *him* and his heirs, or to *him* and the heirs of his body. It confers the benefit of the remainder on the ancestor himself, and inserts in effect his name in the limitation of the remainder. It creates a gift to him, and tacks to such a gift the word heirs, &c., as words of limitation of his estate. A remainder to the heirs of A. is turned into a remainder to A. and his heirs." *

It has always been thought, that the principles of settled law as well as public policy, could advantageously restrain the absolute right of individuals to make a strict settlement of their property. And that right has been modified and controlled by courts in the instances of devises to charities and to aliens, the creation of estates tail, and many others. And Chancellor Kent says, that the Shelly rule only operates as a check of the same kind and in a very moderate degree. Under the existence of the rule, land might be bound up from circulation for a life, and twenty-one years afterwards, only the settler was required to use a little more explicitness of intention and a more specific provision. The abolition of the rule only facilitates such settlements without enlarging the individual capacity to make them. 4 *Com.* 232.*

[Concluded in next Number.]

Miscellaneous.

Maryland Digest. [Digest of the Maryland Reports, comprising Harris and M'Henry, four vols.; Harris and Johnson, seven vols.; Harris and Gill, two vols.; Gill and Johnson, twelve vols.: Bland's Chancery Reports, three vols. By William Henry Norris, George William Brown, and Frederick N. William Brune, jr., of the Baltimore Bar. Baltimore: Cushing & Brother—1847.]

This book was a great desideratum. Until now we have had no digest of the Maryland Reports. This gives us the substance of twenty-eight volumes; and, so far as we can judge, from a cursory examination, with great accuracy and excellent method. We have long known Mr. Brune, one of the authors, and to us, his name affords assurance that whatever he does, or sanctions by his co-operation, is well done. On this assurance alone, we should not hesitate to commend the book to the profession.

Story on Sales. In a late number of this Journal, this work received a brief notice, since which we have seen other notices of a highly favorable character. The following we find in an article which appeared in the September number of *Hunt's Merchants' Magazine*, a periodical of great value, written by A. C. Spooner, Esq., of the Boston bar:

"We suppose we may regard this work as a farewell gift, (or sale ?) by Mr. Story, to a profession which he has abandoned for the more congenial and fascinating pursuits of literature and art; for, besides being a law writer of no little celebrity, he is a poet, painter, sculptor, and a man of letters. If this is the last we are to hear of him in a professional capacity, we can only hope that the distinguished place he seemed destined to fill, may be occupied by men of equal diligence, learning, resources and character."

We regret to learn his abandonment of the profession, and hope that, although he may have relinquished the practice, he may yet feel disposed to devote a portion of his time and talents to legal authorship.

Yale College Law School. We learn from late papers that Gov. Bissell and Henry Dutton, Esq., have been appointed Professors in this School, but whether in the place of, or as co-adjutors of Judge Storrs and Mr. Townsend, we are not informed.

McLean's Reports. We have the pleasure of announcing the third volume of these very valuable Reports, at this moment, we believe, the only continuing series of U. S. Circuit Court Reports. We have not space now to illustrate the variety and importance of the decisions in this volume, but shall present selections hereafter. In the mean time, we cannot refrain from expressing our admiration of the untiring industry of this eminent Judge. Where does he find time to report his decisions?—is a question which at once presents itself. The only answer is, he makes it. He saves those fractions, by never being idle, which most men lose.

License Laws. The Supreme Court of Ohio, at its late session in Elyria, in the case of *De Witt* v. *The State of Ohio*, on Error, made the following decision. The plaintiff in Error was indicted in the Court below for selling spirituous liquors in

less quantity than a quart. It appeared in evidence that the defendant, being a regular druggist, had sold one pint of brandy in good faith for medicinal purposes. The Court refused to charge the jury that thus selling was no violation of the statute, but charged that they should find defendant guilty if they found that he had sold in less quantity than a quart for any purpose whatever. To this charge the defendant's counsel excepted, and brought the case up. The Court held, that the act of the defendant below was no violation of the statute. The enactment was to prevent tippling, as its whole tenor shows. Furnishing medicine to the sick is no violation of its spirit.

Law Reporter—Change of Editors—Retirement of Mr. Chandler. In the October number of this excellent Journal, we have the "*Valedictory*" of Mr. P. W. Chandler, its accomplished Editor, in the following words:

"The connection of the subscriber with the Law Reporter terminates with the present number. The pressure of professional duties, and a desire to give them more exclusive attention, induce him to relinquish the publication to a gentleman, who cannot fail to render it worthy of continued prosperity. In taking leave of the work, the Editor desires to express his grateful acknowledgments to the profession for the kindness with which it has been received, and especially to those in all parts of the country who have contributed to its pages, and have thus been mainly instrumental in its success.

BOSTON, OCT. 1847. P. W. CHANDLER."

We part with Mr. Chandler with sincere regret. Our intercourse, editorial and otherwise, has been of the most agreeable character. We learn, privately, that his successor will be Mr. Phillips, son of the Hon. S. C. Phillips, of whom, without personal knowledge, we can venture to say, that he has a hereditary right to moral and intellectual worth of the very highest order. And, as for Mr. Chandler, we trust that in his "more exclusive attention" to his professional duties, he will reap more of the honors and rewards, than the most successful editorship of a Law Journal, in this country, is likely to receive.

Chancery Costs, Reduction of. We are glad to see that by an order of the English Chancellor, made March 3, 1847, the fees for office copies of Chancery documents are hereafter to be "4*d.* for every folio of 90 words, and no more," in lieu of "2*s.* for the first side, and 1*s.* 6*d.* for every other side, containing two folios of 90 words," as was formerly allowed—a very important reduction certainly.

Navigable Rivers—Bridge—Nuisance—Jurisdiction. It has been recently decided by the United States Circuit Court in Boston, that a bridge built over navigable waters, under the authority of a State, is not indictable as a nuisance in the Courts of the United States.

This decision was given in a case brought against the proprietors of a bridge built over the Acasknet river. Judge Woodbury, in rendering his decision, remarked that an indictment against a corporation for obstructing the navigation of a river, but which had been authorised by a State law, the construction as to its acts must be liberal in its favor. Nothing can be deemed an offence by such a corporation in the Courts of the United States, except what has been made so by the Constitution, or a treaty, or an act of Congress. These Courts being of limited jurisdiction, under a government of limited powers, a case must be clearly within its jurisdiction, or it will be dismissed whenever and however the objection is made. The only mode of punishing acts, as crimes, which obstruct the navigation of rivers and ports within the limits of a State, and are not now crimes under the laws of a State, or the Uni-

ted States, is by further legislation by Congress under its authority to regulate foreign commerce, and that between the States, declaring what obstructions shall be penal, if not removed or modified, and in what Court they shall be tried. Motion to quash the indictment was allowed, and the defendants discharged.

Stocks pledged and sold, and bid in by pledgee—pledgee not entitled to after increase in value. The Court of Appeals of South Carolina, has recently made an important decision in regard to the rights and duties of banks. The case, as stated in the Charleston Mercury, was thus: The Charleston Bank lent $30,000, and received in pledge stock of the Railroad and Bank Company to the amount of five hundred and and forty-four shares as collateral security. The note was not paid at maturity, and, at the request of the debtor, time was given from December 8, 1838, to January 4, 1842, when, after full notice, the stock was sold in open market, by a broker, and bid off, at full market price, by the president of the bank, who caused the amount of sales to be carried to the credit of the debt. The stock was bid off at about $15 per share. Some months after, it appreciated, and sold at a considerable profit. In November, 1845, this bill was filed to compel the bank to give credit for their re-sale, on the ground that, being trustees to sell, they could not buy themselves, and, as trustees, must account for all their profits to their "*cestui que trust;*" and so Chancellor Johnson, in an elaborate decree, decided. An appeal was taken by the bank to the Appeal Court of Equity, and was argued at its late sitting, by B. F. Hunt and C. G. Memminger, Esqs., for appellant, and Mr. Bailey, Attorney General, and Mr Hayne, for the appellee. The Appeal Court reversed the decree, and dismissed the bill, thus affirming the validity of the sale.

Witness—Incompetent for want of Religious Belief.—[We take the following account from the Cincinnati Enquirer, having satisfied ourselves that it is substantially correct. The most remarkable feature in the case is, that two associate Judges, who are not lawyers, should undertake to overrule the President Judge, who is a lawyer; and, in so doing, set aside a fundamental article in our Bill of Rights. We have not space now to comment on the principle of the decision, but may do so at some future time. Eds.]

Criminal Court. A very interesting and important decision was made in the Court of Common Pleas, on Monday, touching the competency of a witness upon the ground of religious belief.

Michael Nash was before the Court upon four indictments for perjury. The principal witness against him was Orson S. Murray, of Warren county, who was objected to as a witness, on the ground that he was an Atheist, and therefore incompetent to testify. From the evidence taken on this occasion, and the statement of the witness at the last term, and perhaps the present, it appears that he believes in *cause and effect:* that there is a first cause that has not been fathomed, though he is not prepared to assert or deny that this first cause is what men call God. Of God, according to the received notion of that Being, and His attributes, he knows nothing; and cannot therefore assert or deny his existence,—but requires proof. As to a future state, he *knows* nothing,—he has not reached it, and it would be equally unphilosophical to assert or deny an existence beyond the grave. In morals, he believes that well doing will result well to the individual and to the community,—and that doing ill will result ill,—and this sequence of good and evil will continue so long as the actor exists. *If there be a future*, this same result of good and evil will exist forever. The obligation to speak the truth he regards as a law of man's nature, which cannot be violated with impunity. He dreads and shrinks from the consequences of a violation of truth. He loves it and clings to it for its own sake. He recognizes the obligation to speak the truth under affirmation, and at all times.

The witness is the editor and publisher of a weekly paper, in Warren county, called the *Regenerator*. We saw several copies of this paper upon the bar table, but do not know whether they were put in evidence or not. In glancing over them we found a somewhat full declaration of the editor's opinions, which corresponds gener-

ally with the statements above given. He believes nothing that he does not see and know to be a visible fact. He regards the terms God, Devil, Heaven and Hell as senseless terms,—because they are applied to things of the existence of which we have nothing of what he regards as evidence. No man has *seen them*, and can testify of them. So of mind, and conscience, and man's spiritual existence. He does not deny the existence of the soul, or of its immortality,—but he will not affirm either, because neither has been seen. He is evidently a monomaniac upon the subject of religion,—though in all things else he is said to be a very upright and correct man,—and we understand witnesses of high character were in attendance to sustain his general reputation for truth and veracity.

The question upon the competency of this witness was ably argued to the Court upon both sides. Judges Wiseman and Saffin, the two junior associates, (Judge Moore being absent,) held that he was incompetent, and must be excluded. We did not hear the opinions pronounced, but we are informed that Judge Wiseman took the ground that our institutions are based upon the Christian religion, and that whoever denies the existence of a God, and disbelieves in a future state of rewards and punishments, is not competent to testify in our Courts.

Judge Caldwell, we are informed, delivered a very able dissenting opinion. We are not advised of his positions, further than that he held the doctrine of the common law upon this point as having been set aside, in Ohio at least, by the third section of the eighth article of our Constitution, known as the *Bill of Rights*,—and that he construed and sustained that provision as being more in consonance with the enlightened and liberal spirit of the age.

The witness, Murray, was excluded; and the prosecuting attorney, being unable to proceed without his testimony, entered a *nolle prosequi* upon all the indictments. Messrs. Carter and Leavitt for the State,—J. W. Piatt and Robert B. Warden Esqs., for the defence.

Drunkenness.—In Kent's Commentaries, the author observes that, although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground, that he should not be allowed to stultify himself, the result of the modern authorities is, that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice. With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. When the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in an action for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may be against the defendant, even though he may have protested against such a contract. So, a tradesman, who supplies a drunken man with necessaries, may recover the price of them if the party keeps them when he becomes sober, although a contract for goods bargained and sold would fail—*Pollock C. B., in Gore* v. *Gibson.* 13 *m. & w.* 62 3. *Vide: Barrett* v. *Buxton*, 2 *Acken*, 167. *French* v. *French*, 8, *Ohio Reports*, 214.

History of the Ordinance of '87. Peter Force, Esq., of Washington City, in searching for materials for his work, "American Archives," became possessed of the original projects and reports submitted to Congress respecting a plan of government for the Northwestern Territory, from the first step in 1784 to 1787, when the Ordinance was finally adopted. He has the copy of the Ordinance of 1787, with all its alterations marked on it, while under consideration, just as it was amended at the President's table, amongst which the clause respecting slavery remains attached to it, as as an amendment, in Mr. Dane's handwriting, in the exact words in which it now stands in the Ordinance.

From these materials, it appears that on the 1st of March, 1784, a committee consisting of Mr. Jefferson, Mr. Chase, of Maryland, and Mr. Howell, of Rhode Island, submitted to the Congress of the Confederation a plan for the temporary government of the Western Territory. That plan contemplated, when the population should be sufficient, the establishment of a permanent government. It also provided, that "after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said States, otherwise than in the punishment of crimes whereof the party shall have been duly convicted to have been personally guilty."

This was the last of five provisions, on which, as their basis, it was declared, "both the temporary and permanent governments should be established."

This report was recommitted to the same committee, who, on the 22d of March reported another, precisely similar, as to this proviso. On the 19th of April, on motion of Mr. Speight, of North Carolina, the anti-slavery clause was struck out, and the report, thus amended, agreed to, South Carolina alone voting in the negative. It remained in force, as the law of the land, until 1787.

On the 16th of March, 1785, the same proviso in substance, except as to the delay of its taking effect, until 1800, was revived as an amendment to the law, already in force, by Rufus King. The motion was referred to a committee of the whole House and never afterwards called up.

The general subject of providing for the government of the North Western Territory, seems to have been before Congress, and referred to divers committees at various times, between this and 1787, notwithstanding the law of 1784 was in force. Its provisions did not seem to give satisfaction.

On the 26th of April, 1787, a committee of which Mr. Dane, of Massachusetts, was a member, reported an "Ordinance for the Government of the Western Territory." It did not contain the anti-slavery clause. It was read twice, and ordered to a third reading, which was however postponed.

On the 9th of July, it was again referred to a committee consisting of Mr. Carrington, of Va., Mr. Dane, of Massachusetts, Mr. R. H. Lee, of Va., Mr. Kean, of South Carolina, and Mr. Smith, of New York, a majority from slaveholding States.

On the 11th of July, they reported an ordinance, without the anti-slavery clause, which, the next day, on motion of Mr. Dane, was added as an amendment, in the in the language in which it now stands, and on the 13th passed by the unanimous vote of the eight States present.

On the same day, the Convention for framing a Federal Constitution, then also in session in Philadelphia, adopted the "three-fifth rule" in reference to direct taxation and representation.

Mr. Dane's amendment differed from both Mr. Jefferson's and Mr. King's proposition in providing for the surrender of fugitives, without which, says Mr. Force, it could not have been carried. C.

Correction. In the last (the October) number of the Journal, page 19, line 29 from the top should be read after line 31.